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IN THE

Supreme Court of the United States

October Term 1964.

No. 252.

DAVE FLEISCHER, individually and as trustee and receiver in dissolution of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Petitioner,

against

A.A.P., INC., ASSOCIATED ARTISTS PRODUCTIONS, INC., U.M. & M. TV CORP., W.P.I.X., INC., PARAMOUNT PICTURES, INC., PARAMOUNT PICTURES CORPORATION, DUMONT BROADCASTING CORPORATION, FLAMINGO FILMS, INC., KING FEATURES SYNDICATE, INC., FLEISCHER STUDIOS, INCORPORATED, a New York corporation, MAX FLEISCHER, individually and as co-trustee of FLEISCHER STUDIOS, Incorporated, a Florida corporation,

Respondents.

PETITIONER'S REPLY BRIEF.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1964

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Respondents.

PETITIONER'S REPLY BRIEF.

Preliminary Statement.

Counsel for the respondents Paramount Pictures, Inc., Louis Nizer (whose "Life in Court" is surpassed only by the exploits of his fictional counterpart "Perry Mason"), resorts to the "BIG LIE" and cuttlefish techniques to defeat this petition for certiorari, *in a case in which there is a crying need for review by this Court of matters of great public importance.* The techniques employed by him are not new, but they are effective if not checked.

By unjustified character assassination, by appeals to hatred, slander and libel, by the vitriol poured upon petitioner and his attorney, which has characterized every attempt to be heard on the merits in this and in the lower courts, and by the downgrading of the questions presented to this Court as "*involving elementary principles of law and the construction of an unambiguous contract*," Mr. Nizer seeks again to becloud the issues and to turn this petition into an *argumentum ad hominem*. The principles of law involved are indeed novel and of great public importance and the contract a complex sixty-page document.

The higher the court the greater the chance of success of these confusing tactics. The limited appellate jurisdiction of the New York Court of Appeals, of the U. S. Court of Appeals, and of this Honorable Court, makes it nigh impossible, in the face of such tactics, to obtain appellate review. It is against these handicaps that petitioner seeks to obtain review in this court. To succeed, petitioner must clarify the issues and remove the penumbra which has been cast over them by respondents' counsel, all of whom rely on Mr. Nizer as lead counsel, for exculpation of their clients. The briefs submitted by the remaining respondents may well be described as "me too" briefs.

The Sham Side Issues of Respondents' Counsel.

"*The Opinions Below*" which are discussed at pages one and two of Mr. Nizer's brief are the initial instances of distortion and irrelevant name calling, which only obscure the vital questions presented for review. For example:

(a) Petitioner and his counsel are taken to task for merely citing the lower Court's opinion (Supreme Court, New York County) of *Fleischer vs. W.P.I.X., Inc., et al.*,

(30 Misc. 2d 17), but omitting "all reference to the Appellate Court decisions which rendered that judgment final." In truth, those appellate decisions did not render the judgment final at all. Those Appellate Court decisions are reported at 14 A. D. 2d 846 (1961), appeal dismissed (for inability to print record) 11 N. Y. 2d 876 (as not final), appeal dismissed "for want of a federal question" 371 U. S. 16 (1962).

The irony of respondents' argument is that the petitioner sought to appeal from the lower Court decision (30 Misc. 2d 17), as a poor person (Rule of Civil Prac., §35), but was denied the right to appeal (14 A. D. 2d 846) on the false contention of the defendants that he (petitioner) had more than $300 in cash or money's worth and should be required to print his record on appeal and exhibits, even though such printing would cost $7,000 which he assuredly did not possess.

From the dismissal of his appeal for lack of prosecution (14 N. Y. A. D. 2d 846) because he could not raise the $7,000 of printing costs, petitioner sought to appeal to the New York Court of Appeals. Again his appeal was dismissed by that court as non-final within the meaning of the New York State Constitution (11 N. Y. 2d 876). On his appeal to this Court upon the ground that "Equal justice under the law" was not dispensed to rich and poor alike in New York State, in permitting the rich to appeal without showing merit if they had the money to print their records, while denying that right to the poor on typewritten records, this Court dismissed said appeal for want of a "substantial federal question" (371 U. S. 16-1962). The lower Court judgment is final on its own account and not because of appellate review.

Although too late to cure the injustice done to the petitioner, it is now a fact that the New York State Legislature (see Civil Practice Law and Rules, Sec. 5529[1]),

cured this patent inequity in the enforcement of its appellate procedures by the enactment in 1963 of the CPLR, which *permits* rich and poor alike to prosecute their appeals by the appendix method, with optional mimeographing of records and exhibits (CPLR, Rule 5529, sub. 1).

There was, in consequence, no appellate review of the decision of Judge Baer in *Fleischer vs. W.P.I.X., Inc., et al.* (30 Misc. 2d 17). Whether said judgment is to be held to be a valid judgment for the purposes of collateral estoppel in the antitrust and accounting actions is to be determined by the lower Court's decision itself and not by the action of any Appellate Court in denying leave to appeal as a poor person, or by the dismissal of his appeal by this Court as not presenting a federal question.

(b) The next opinion which is stated by Mr. Nizer to be "pertinent" (but which has not the slightest relation to the issues to be decided herewith) is the opinion of Judge Herlands which denied disqualification of Louis Phillips and his partner Louis Nizer because of the prior representation by Phillips and Nizer of petitioner, in drawing the very contracts with King Features Syndicate, Inc., which were the subject matter of the within litigation (163 F. Supp. 548—S.D.N.Y. 1958).

Although Louis Phillips, late partner of Louis Nizer, was the lead counsel for Paramount which sought successfully on appeal to review the order of the District Court denying disqualification in the litigation arising out of the antitrust suit (85 F. Supp. 881) of *U. S. A. vs. Paramount*, as an appealable order, Paramount and its attorneys took exactly the opposite point of view on the appeal of petitioner from the denial of disqualification. The U. S. Court of Appeals reversed its position and held that the order denying disqualification in the instant case was non-final and hence not appealable (264 F. 2d 515).

This Court denied certiorari (359 U. S. 1002). The merits of the litigation were not considered.

(c) Not content with this victory (which never reached the merits of the litigation), counsel for Paramount took up a vendetta against petitioner's attorney and sought an opinion from District Judge Palmieri, that said petitioner's counsel had been castigated in the opinion filed on the non-appealable order by the U. S. Court of Appeals. Although the New York Court of Appeals has held that the transmission for publication in an unofficial report, *sua sponte*, by a judge, of his opinions to West Publishing Co., which are libelous of an attorney, renders the judge responsible in libel, for untruthful statements made by him in his opinions, the District Court and the U. S. Court of Appeals have taken a contrary view with respect to federal employees, and this Court denied certiorari (368 U. S. 827, 369 U. S. 871).

(d) There may be no remedy in the Federal Courts for libels committed by federal employees, but the libels remain nevertheless, and there is the undoubted right of the injured to speak his mind and to petition his government or Congress for redress, under the First Amendment. But what relevancy have these sham matters to the questions presented to the Court on this petition for a writ of certiorari, except to becloud the issues, and prejudice the Court against petitioner and his counsel? It is unfortunate that the "BIG LIE" techniques and the cuttlefish tactics of muddying the waters do succeed. The higher the court the greater the chance of success, for such is the burden of work in this court that many petition but few are called to have their grievances heard. Hence the importance of adhering rigidly to essential matters and not being sidetracked by sham issues.

Since the Antitrust Cause of Action is Directed Only Against the Paramount Defendants We Shall Consider the Questions Presented on That Cause of Action in the Order in Which They Are Presented by Said Respondents.

(Answering Paramounts' preliminary statement under Point I, page 8.)

Paramount respondents first urge that the judgment and decree of *United States vs. Paramount Pictures, Inc.* (85 F. Supp. 881, U.S.D.C., S.D.N.Y. 1949), rendered pursuant to the prior opinion of this Court (334 U. S. 131, modifying 70 F. Supp. 53), are irrelevant to the factual allegations in the within case. They conceal the fact that the May 27, 1938 agreement between Fleischer Studios, Inc. (of New York), and Paramount Pictures, Inc., was entered into two months before the Government's antitrust action was commenced charging the entire industry with violations of the Sherman and Clayton Acts and that the May 24, 1941 agreement was exacted from the Fleischer brothers individually and as officers and stockholders of Fleischer Studios, Incorporated (Florida), in the teeth of said then pending Government antitrust action.

During the pendency of the Government antitrust action, both Paramount, its distributors and its co-defendants had worked havoc in the motion picture industry and had brought ruin to producers and theatre owners alike and to the Fleischer Studios, Incorporated, and Dave Fleischer individually. It is a curious coincidence that in May, 1946, Fleischer Studios, Incorporated, had been dissolved for nonpayment of taxes by the action of the Governor of Florida, less than one month prior to the filing of the opinion of the District Court on June 11, 1946 (66 F. Supp. 323), which found that the conspiracy of the industry existed and directed methods of correction which

were found inadequate by this Court (334 U. S. 131). The Supreme Court did find against the continuance of operation of theatres owned vertically by the motion picture companies (defendants) and "set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand" (334 U. S. p. 175): "In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held" (334 U. S. at p. 170). The conspiracy found by the District Court on June 11, 1946 (66 F. Supp. 323), was affirmed by this Court. Justice Douglas said:

> "The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants, a vertical one between each distributor and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price fixing disclosed by the record. We think there was adequate foundation for it too" (334 U. S. 142).

It was not until July 25, 1949 (85 F. Supp. 881), that the District Court rendered its opinion after remand from this Court, and then for the first time applied the remedy which became final. But by that time, it has been held in the within action, that the prostrate Fleischer Studios, Incorporated, had been dead beyond resuscitation by reason of the elapse of three years from the date of its involuntary dissolution by the Proclamation of the Governor of Florida and it has been further held that all of the assets of that corporation had been destroyed and abated by the action of the State of Florida and that the defendant Paramount Pictures, Inc., and its successor Paramount Pictures Corporation, were free to take them all into their possession without accounting for either their antitrust activities or for the properties seized by them. It is therefore meet and proper that the findings of the District Court with respect to the defendant Paramount, as it in its operation effected the downfall of Fleischer Studios, Incorporated,

and Dave Fleischer be recited. Such findings are incorporated by reference in the complaint in the within action (32a-36a, 41a) (85 F. Supp. at p. 889).

"We have been instructed by the Supreme Court to consider the question of geographical distribution of theatres among the five major defendants. In dealing with this subject, we do not take into account the presence or absence of independent theatres in the areas dealt with. We have examined the defendants' theatre holdings and find that in cities of less than 100,000 in population, there is no doubt that Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, there was in general little competition among the defendants, although considerably more than in towns of under 100,000. A summary of the data which substantially represents the true situation, but owing to certain differences in the proofs offered must be regarded as approximate rather than as entirely accurate, is as follows:

CITIES OF LESS THAN 100,000.

"In cities of less than 100,000, Paramount had complete or partial interests in or pooling agreements with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—or only 3%—there was competition with another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9% were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant op-

erating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

CITIES OF 100,000 AND OVER (p. 890):

"In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or 26%, there was competition with other defendants. In an additional 10% of the cities containing 17% of Paramount's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 12% were located 18% of Paramount's theatre interests. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest" (p. 890).

"(3) One of the chief matters referred to us by the Supreme Court is the effect of vertical integration upon competition in the industry. *While vertical integration would not per se violate the Sherman Act, the Supreme Court has made it clear that if such integration is conceived with a specific intent to control the*

market or creates a power to control the market which is accompanied by an intent to exercise the power, the integration becomes illegal" (p. 893).

"(4) We are not satisfied that the plaintiff has shown a calculated scheme to control the market in the conception of the defendants' vertical integration, rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. We do not suggest that every vertically integrated company which engages in restraints of trade or conspiracies will thereby render its vertical integration illegal. The test is whether there is a close relationship between the vertical integration and the illegal practices. *Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act.*"

To these vertical and horizontal conspiracies found by the District Court, in the case of *United States vs. Paramount* (85 F. Supp. 881), the plaintiff has added the allegations of the antitrust cause of action in this case as it effected the destruction of Dave Fleischer individually and Fleischer Studios, Incorporated. What respondents Paramount and the remaining respondents now contend is that Fleischer Studios, Incorporated, was so completely

destroyed by Paramount as to be beyond resuscitation, by this or any other Court, and that Dave Fleischer individually, had no rights because he was a mere stockholder of the defunct Fleischer corporation. It has been on that simple but outrageous basis that plaintiff has been thrown out of every court to which he has applied for relief, and for which reason petitioner applies to this Court as a court of last resort for the crying remedy to which he is entitled.

I(a). The respondents seek to sustain the dismissal of the individual antitrust suit of Dave Fleischer with the contention that Paramount's antitrust activities "were directed, not against plaintiff-petitioner personally, but against a corporation in which he was merely a stockholder" (Resp. Paramount brief, p. 3, item I(a)). This argument is fallacious (Point I(a), p. 8, Resp. Brief).

Both contracts and the factual allegations of the complaint show that the targets of Paramount were Dave Fleischer and Max Fleischer, individually, who were respectively the "Director" and "Producer" of the motion picture cartoons which achieved world wide renown and which ultimately found their way into the possession of Paramount as a result of the antitrust activities complained of.

Early in the history of the motion picture industry, its actors, directors and producers had operated through corporate forms, for purposes of self protection, with binding obligations enforced upon the individual artist, director or producer as here, by injunctions, options for rehiring and negative covenants. The prime example of this was respondent Paramount, which originated *sub. nom.* as Famous Players-Lasky Corporation (App. 6a). United Artists Corporation (of which Messrs. Benjamin

& Krim, are presently the parent) originated as a vehicle for a exploitation of the talents of Charles Chaplin, Douglas Fairbanks and Mary Pickford. Metro, Goldwyn Mayer (MGM), (before it went public) was the vehicle for the production talents of Samuel Goldwyn and Louis B. Mayer.

The instances of the use of the corporate form to exploit the talents of the individual artist to this day are innumerable. Dave Fleischer and Max Fleischer so operated and were "the guiding spirits" in the production of motion picture cartoons by, Fleischer Studios, Incorporated (App. p. 5a). In addition to the vertical and horizontal conspiracy found by the District Court in *U. S. A. vs. Paramount,* it was against the Fleischers that the antitrust activities of Paramount were directed and it was the individual commerce of Dave Fleischer which was destroyed and interfered with by defendants Paramount. Dave Fleischer was stripped of his assets, his stock was hypothecated as security for corporate loans, he was enjoined from competing with Paramount, subject to other personal interference with his commerce as set forth in pages 18 to 23 of the original petition.

The question as to whether the corporate fiction is to be disregarded to obtain enforcement of an antitrust suit by an artist whose commerce has been interfered with and destroyed should be reviewed by this court as a question of great public importance.

The "Yellow Dog" Contract of May 24, 1941 (Exhibit "A") Considered, as it Destroys the Individual Commerce of Dave Fleischer.

The contract in the within case (Exhibit "A") is a "Yellow Dog" contract which resulted in the virtual enslavement of Dave Fleischer, and has driven him out

of the profession or business which he inaugurated in 1919 from the infancy, as an art form, of the motion picture cartoon. A copy of Exhibit "A," the "Yellow Dog" contract of May 24, 1941, has been furnished to each of the Justices of this Court. It is not difficult to see that although it is made between, Fleischer Studios, Incorporated, and Paramount, it is in reality a means of stripping the two Fleischers (Dave and Max) of their shares in and control of the corporation, stripping them of their film library by means of a stockholders' consent, obtained from both stockholders, Dave and Max Fleischer (Article Second), releasing both Paramount and Fleischer Studios, Incorporated, of all claims of Dave and Max Fleischer, except those contained in Exhibit "A" (Article First); stripping both Dave Fleischer and Max Fleischer of their individually owned patents "used in or intended to be used in or in connection with motion pictures or motion picture cartoons" (Article Second [e]); reserving the use of the names "Fleischer Studios" and "Dave Fleischer" exclusively to Paramount in connection with the film library with which they were endowed by said agreement (Article Fourth). It required Dave Fleischer to continue his services as "Director" for 26 weeks to complete the as yet unfinished "New Cartoons" (Article Sixth). As a condition to permitting Dave Fleischer to produce any other motion pictures than those contracted to Paramount, he was required to do so in his "spare" time and burdened with a requirement to offer the finished product to Paramount at the price that anyone else would pay for same (Article Sixth, page 14); no other producer of pictures would undertake a production thus optioned to Paramount.

Then follows Article Twenty Fourth, which is the indentured servant portion of the "Yellow Dog" contract. It provides:

"If * * * Dave Fleischer shall terminate (his) services and employment as aforesaid, or if * * * Dave Fleischer shall during said period of (26) twenty six weeks or at any time thereafter fail or refuse to perform or be incapacitated from performing, his services as employee of the Producer (Fleischer Studios, Incorporated), for any reason whatsoever, or upon the termination of this agreement by Paramount or upon the expiration of the period of time provided for in this agreement, it is agreed that (and the Producer shall cause * * * Dave Fleischer to perform and observe the terms, provisions and conditions of subdivisions [b] and [c] and [d] of this Article Twenty-fourth)" (p. 52, Exhibit "A").

Said subdivisions (b) and (d) are as follows:

Article Twenty Fourth (b) of the contract contains a negative covenant restraining Dave Fleischer from the use of his own name directly or indirectly after the termination of his employment or of the names, "Fleischer of Fleischer Studios, in or in connection with the production, distribution, exhibition, television, performance reproduction, use exploitation of any motion picture cartoon whatsoever for a period of one (1) year" after the termination of his employment "AND THEREAFTER SUCH PERSON (DAVE FLEISCHER) SHALL BE ENTITLED TO USE HIS OWN NAME (BUT NOT THE NAMES "FLEISCHER STUDIOS," OR "DAVE FLEISCHER STUDIOS") IN CONNECTION WITH MOTION PICTURE CARTOONS ACTUALLY PRODUCED BY HIM" (pp. 52 and 53 of Exhibit "A").

Under Article Twenty-fourth (d) the negative covenant in subdivision (b) above was to apply even if the contractual relationship was terminated by Paramount, and at any time (p. 53, Exhibit "A").

By Article Twenty-eighth of the contract, Max Fleischer and Dave Fleischer were to deliver their resignations in blank to Paramount, as well as their shares of stock endorsed in blank with the "sole and exclusive voting power of said shares of stock during the period of this agreement including *any option periods hereunder*, and in connection therewith (Paramount), shall have the right to cause itself or its designee to become a stockholder of record in the Producer (Fleischer Studios, Incorporated) (p. 60, Exhibit "A").

The option periods referred to above are five successive options contained in Article Twenty-third of the Agreement Exhibit "A" commencing May 24, 1942, and ending May 23, 1947, to call upon Fleischer Studios, Incorporated, to produce additional motion picture cartoons.

Finally, by a separate agreement attached to and made a part of Exhibit "A," Dave Fleischer and Max Fleischer individually were required "to approve the use of their names, the name 'Fleischer' and the name 'Fleischer Studios,' all as more fully provided in said Agreement" and to "execute, verify, acknowledge and deliver, * * * to Fleischer Studios, Incorporated, or to you (Paramount) such deeds, assignments, stock certificates, resignations, instruments and documents * * * as you may from time to time request and designate, in connection with any of the matters contained in or referred to in any of the provisions of said Agreement between you (Paramount) and Fleischer Studios, Incorporated" (see letter agreement attached to Exhibit "A").

Despite the contrary allegations contained in the comprehensive antitrust complaint showing personal interference with and destruction of the plaintiff's commerce individually, District Judge Palmieri dismissed the plaintiff's claim of individual destruction of his rights by the

defendants (180 F. Supp. 717) with the cavalier statement that (60a):

> "The second cause of action does not contain, however, any allegation of facts tending to show any *direct injury* to plaintiff's commerce as an individual, and it is well established that ***a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation may have suffered because of a conspiracy to violate the antitrust laws.*** E.g., *Bookout vs. Ching Chun Theatres, Inc.*, 253 F. 2d 292 (2d Cir. 1958)."

And those stalwart champions of the rights of the individual Circuit Judge Kaufman (who integrated the New Rochelle, New York, public schools), and Circuit Judge Marshall (*"You have to give hope to a man who has a foot on his neck" New York Times, August 11, 1964, page 11, column 3*) said after hearing the plaintiff's complaint of individual interference with his commerce by the antitrust activities of the defendants Paramount at 329 F. 2d 425:

> "When the conclusory allegations of the complaints are pierced, be they characterized as "antitrust" or "accounting" claims, it becomes apparent that plaintiff is simply asserting that Paramount has violated the express or implied terms of a 1941 contract. *And since that agreement was not with Fleischer individually, but with Fleicher Studios, Inc.,' it is equally clear that Fleischer may not secure a personal recovery for an alleged wrong done his corporation"* (Petition, Appendix A, p. 49). (*Fleischer v. A. A. P., Inc.*, 329 F. 2d 425.)

It was precisely Dave Fleischer's claim and so alleged in his antitrust complaint that what he did and what he signed on May 24, 1941, was done and signed with a "foot on his neck"; that the purported defaults for want of adequate income which made it possible for Paramount to seize the property of Fleischer Studios, Incorporated, and compel him to consent to the sale and transfer in-

dividually of all of its property (which could not have been accomplished without his individual consent), was done under duress (Complaint par. 32, 33-Appendix, pp. 37a to 39a, inclusive). Petitioner alleged that he executed "a negative covenant restraining said Dave Fleischer from competing with Paramount Pictures, Inc., in the release of the tremendous film library above obtained by them as of May 24, 1941, under duress, coercion and force practiced upon plaintiff * * * as aforesaid" (Appendix 39a).

An enlightened contribution to this problem was made by District Judge Croake (211 F. Supp. 276, [S. D. N. Y.] 1962, re-argued, 213 F. Supp. 123, 1963), in the case of *New Sanitary Towel Supply, Inc., Paul Ullman and Phillip H. Lewis, plaintiffs vs. Consolidated Laundries Corporation; et al., defendants.* There, relying upon and despite the erroneous factual analysis in this very case (*Fleischer vs. A. A. P. Inc.*, 180 F. Supp. 717) Judge Croake held that "the reason for the rule against such recoveries (by a stockholder of a dissolved corporation) is not so much to prevent overlapping recompense to both corporation and stockholders, but is rather to prevent the recovery for injuries which are indirect in nature" a purpose which he said was implicit from the opinion of Palmieri, J., in *Fleischer vs. A. A. P. Inc.* (180 F. Supp. 717). Judge Croake nevertheless held that where the target of the antitrust activities is the individual stockholder who operated a laundry business in corporate form, the individual whose commerce had been destroyed may maintain an antitrust action in his individual capacity. In denying the motion to dismiss the complaint of the individual defendant, District Judge Croake said in pertinent part (p. 278):

> *"Defendants urge that the complaint does not allege actionable harm in asserting that plaintiffs*

Paul Ullman and Philip H. Lewis were coerced into executing the restrictive covenants. They maintain that such injury is not direct and is not an injury to the 'business or property' within the meaning of Section 4 of the Clayton Act.

"'Business or property' has been defined as follows:

"'* * * It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit,—persistent human efforts which have for their end pecuniary reward. It denotes 'the employment or occupation in which a person is engaged to procure a living' *Allen vs. Commonwealth*, 188 Mass. 59, 74 N. E. 287, 288, 69 L. R. A. 599" *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417, 139 A. L. R. 1013 (7th Cir. 1942).

"It is apparent from the complaint that these individual plaintiffs were active in the linen, diaper and laundry businesses for some period of time prior to their, allegedly having been forced to sign the restrictive covenants. Coercion to drive them from their ordinary occupation seems to constitute injury to their 'business or property' within the definition of that term quoted above. Moreover, there is a substantial authority to the effect that depriving a person of his occupation may be actionable under the antitrust laws.

"The gravamen of the complaint is that the damage defendants are alleged to have inflicted was to the businesses of the corporate plaintiffs. There is no explicit allegation that the object of the conspiracy was to harm the business of the individual plaintiffs, or even that the individuals had any particular businesses to harm. However, *a fair inference can be drawn from the complaint that the individual plaintiffs had been engaged, through the corporations, in the laundry, diaper and*

linen businesses. If nothing more had been done than to destroy the businesses of the corporations, then the individual plaintiffs, as such, would have no right to recover. The complaint alleges that defendants went further, i. e., they coerced Ullman and Lewis to give up a right they otherwise would have had, that is, a right to engage in the laundry, diaper and linen businesses. Even though it is alleged that the principal purpose of the conspiracy was to injure the businesses of the corporations, if plaintiffs can show that they were forced out of this field of business activity, it cannot be said, as a matter of law, that they were not injured directly" (p. 279).

"This question might turn upon the nature of the skills needed in the business, the importance of being acquainted with persons and firms in the industry, the good will of the individuals and the corporations, the position and status Lewis and Ullman may have had in the industry, and many other factors. These issues are not before the court on this motion and must be left for trial.

"Defendants further argue that since the restrictive covenants were delivered to corporations which are not defendants in this action and which are not alleged to be co-conspirators, the injury is too indirect. There are, however, allegations in the complaint that defendants compelled the execution of the covenants and that the corporations holding them were controlled by some of the defendants. The execution of the restrictive covenants must, therefore, be deemed to have been compelled by members of the conspiracy. It must also be assumed as a fair inference that the covenants can be enforced by some of the defendants through the allegedly controlled corporations. The connection between the acts complained of and the injuries alleged need not be pleaded with further particularity" (p. 280) (Italics supplied).

On re-argument of *New Sanitary Towel Supply, Inc., et al. vs. Consolidated Laundries Corporation, et al.*, 213

F. Supp. 123, defendants therein cited the cases of *Gerli vs. Silk Association*, 36 F. 2d 959 (S. D. N. Y. 1929 —Thacher D. J.) and *Westmoreland Asbestos Co. vs. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939) aff'd 113 F. 2d 114 (2d Cir. 1940) in support of their motion, but District Judge Croake denied the motion for re-argument saying:

> "CROAKE, District Judge:
>
> "This motion is for an order granting re-argument of a motion for judgment on the pleadings which was determined by the opinion of this Court, dated November 30, 1962, and filed December 3, 1962, in so far as that motion was denied.
>
> "In support of their application, the defendants cite *Gerli vs. Silk Ass'n of America*, 36 F. 2d 959 (S. D. N. Y. 1929), and *Westmoreland Asbestos Co. vs. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939) aff'd 113 F. 2d 114 (2d Cir. 1940), *as authority for granting judgment on the pleadings in their favor with respect to causes of action based on covenants not to complete which were executed by two of the individual plaintiffs. They further assert that complaints in these cases contained allegations similar to those in the within case. The decisions in those matters are readily distinguishable from this one.*
>
> *"The allegations in the cited cases are general in nature and refer to destruction of 'good name,' 'credit,' 'reputation,' 'good will,' 'prestige,' and the like, whereas in the instant case there is a specific allegation that defendants coerced said plaintiffs to execute the covenants. In the cited cases, the harm alleged is that which would be expected to flow naturally as incidental effects of the primary damage done to corporate businesses. On the other hand, the allegations in the case at bar would require additional acts on the part of the defendants, which acts, by their very nature, would have to be aimed directly at said plaintiffs.*

"The motion for re-argument is granted, and upon re-argument the original decision dated November 30, 1962, and filed December 3, 1962, is adhered to."

The question so eloquently answered by Judge Croake in 1962, in *New Sanitary Towel Supply Co.* was first postulated by Circuit Judge Learned Hand, in the case of *Bookout v. Schine Chain Theatres* (2d. Cir. 253 F. 2d 292-1958), which case was cited by D. J. Palmieri (1959) in dismissing the individual cause of action of Dave Fleischer. In Bookout, Judge Hand said in pertinent part (p. 295):

> "*As a new question it might perhaps be argued that if a shareholder, or a creditor, or any other person has been injured by a conspiracy under the AntiTrust Acts, a claim arises in his favor quite separate from any claim of the corporation.* Be that as it may, this has not been the course of the decisions, which have distinguished between injuries arising directly from a conspiracy and those that are only 'indirectly' or 'incidentally' its result. Such was the situation in *Loeb v. Eastman Kodak Co., supra*, 183 F. 704, 709; *Westmoreland Asbesto Co. v. Johns-Manville Co., supra*, 30 F. Supp. 389, affirmed 113 F.2d 114; *Peter v. Western Newspaper Union, supra*, 200 F.2d 867, 872, 873; *Productive Inventions v. Trico Products Corp.*, 2 Cir., 224 F.2d 678; and *Gerli v. Silk Association of America, supra*, 36 F.2d 959. These cases decide, not only that the shareholder is not entitled to recover by separate action for his share of the corporate loss, but that for relief from any injury suffered by him individually, even though it has resulted from the execution of the conspiracy, he must look to the general municipal law. *The liabilities that the AntiTrust Acts create are confined to injuries immediately affecting interstate commerce.*" (Italics supplied.)

We respectfully submit that the "new question" postulated by Circuit Judge Hand, in *Bookout*, and cor-

rectly answered by Judge Croake in *New Sanitary Towel Supply, Inc.*, is a bill of rights alike for downtrodden artists, directors of motion pictures, laundrymen, in short artisans or tradesmen of any sort who are oppressed in interstate commerce. This Court should, in the interests of substantial justice grant certiorari to review the judgments appealed from which have thrown the petitioner out of court. *"You have to give hope to a man who has a foot on his neck," whether he be white or black. You cannot rationalize him out of an antitrust claim by saying his claim is "too indirect" or "remote" until you hear the evidence. That is what has been done in this case.*

I(b). The respondents reiterate in Point I(b) of their brief that under Florida corporation statutes, the cause of action asserted by plaintiff as trustee and receiver abated three years after the corporation's dissolution in 1946, i. e., in May, 1949.

Much water has flown under the dam since U. S. District Judge Weinfeld, sitting in the Southern District of New York, rendered the decision in what is described by our adversaries as *"the leading case of Walder v. Paramount Publix Corp."* (132 F. Supp. 912), granting summary judgment dismissing an antitrust cause of action brought against the same defendants, Paramount, by a Florida corporation which had been *voluntarily dissolved*. *Walder* was the identical case relied upon by Judge Palmieri in dismissing the antitrust cause of action in the within case, and which was followed by the New York Supreme Court (Justice Baer) in the two cases tried before him (30 Misc. 2d 17).

To quote from the recent case of *Leggat v. C. I. R.* decided March 20, 1964, by the U. S. Court of Appeals, Second Circuit, where Friendly, C. J., wrote the opinion [illegible] F. 2d [illegible], it must be apparent at this late date that

"In finding a state's law, a Federal Court should not follow mechanically the most recent available statement of an intermediate court but rather must determine on consideration of all relevant factors how the highest court of the state would decide the question if asked today (cf. *Bernhardt v. Polygraphic Co.*, 350 U. S. 198, 205, and concurring opinion of Mr. Justice Frankfurter, 209-212-1956; *Strubble v. Sonnenschein*, 290 F. 2d 185; 188-189 2d Cir. 1962; *Evans v. S. J. Groves & Sons Co.*, 315 F. 2d 335, 2d. Cir., 1963)."

We believe that the most authoritative statement of the Florida law is contained in the case of *Gerstel v. William Curry's Sons Company* (25 So. 2d 560):

> *"the rule of the common law is obsolete and has long been superseded by statute in this state.* Under the law of this state when a corporation is dissolved its assets are first used to pay valid claims against it and if any remain, they should be distributed among its stockholders. We do not think that when a corporation is dissolved by the Governor as provided in Chapter 16880, Act 1935 (Sections 610.16 to 610.18, Florida Statutes 1941) the three-year prolongation period is available for the purpose of closing its business. The very terms of Section 9 of the Act support this view and the decisions of the New York Courts from which state it was derived support it (citing New York cases)."

The respondents scorn the notion that there is a marked distinction between the three-year provision contained in the "voluntary dissolution" Florida statute and the absence of any such provision in the "involuntary dissolution" Florida statute; but it is submitted that the distinction is real. In the instant case the involuntary dissolution of Fleischer Studios Corporation was brought about by the antitrust activities of defendant, Paramount. This is shown by Article Twenty-Fourth of the agreement of May 24, 1941 (Exhibit A) which provides that whether the agreement is terminated by either of the Fleischers or

by Paramount, the name "FLEISCHER STUDIOS" could not be used by them in connection with motion picture cartoons actually produced by them (p. 53, Exhibit A) at any future time without regard to limitation. Furthermore, simultaneously with the execution of the said Exhibit A, both of the Fleischers were required to deliver their certificates of stock which controlled Fleischer Studios, Incorporated, to Paramount, together with their resignations as officers and directors, to be effective during the period of the contract as well as the options thereof which did not expire until May 24, 1947 (Article Twenty-eight, Exhibit A).

Fleischer Studios, Incorporated, was dissolved in May, 1946, by the action of the Governor of Florida. It could have been revived as a corporation at any time up to this date by the mere payment of the taxes in arrears from 1943 to 1946, if the plaintiff, Dave Fleischer, could have acted alone. Unfortunately, without the consent of his late brother, Max Fleischer, Dave Fleischer could not have revived Fleischer Studios, Incorporated. When a corporation is so revived, all of its disabilities vanish, e. g., see *Spector v. Hart*, 139 So. 2d 323 (1962) and *McClung v. Hill*, 96 F. 2d 236 (1938). An analysis of these cases indicates that they "stand for the proposition that under Section 9 of Chapter 16880, Laws of 1935 (Florida), the involuntarily dissolved corporation is not 'dead' but merely without power to carry on business in corporate name or form, which disability may be corrected by the payment of the arrears in franchise taxes that have accrued during the three-year period of non-payment, prior to involuntary dissolution" (see pp. 30-31 of petition for a writ of certiorari). If a corporation may be resurrected then it is not "dead" but merely disabled from carrying on business in corporate form. That is the proper interpretation of the Florida Statute in question, which has been ignored by the Courts below.

The respondents urge in Point I(c) that "The Statute of Limitations barred this cause of action." In the body of the point, they urge that the four-year period of limitation contained in the federal statute, which was not enacted until 1955 and did not become effective until January 7, 1956 (69 Stat. 283, 16 U.S.C., Sec. 16(b)) is the applicable statute, thus abandoning the claim that the action abated under Florida law.

In addition to the vertical and horizonal conspiracies found in *U. S. A. v. Paramount*, the conspiracy was a continuing one as alleged in the complaint designed to remove the competition of the Fleischers from the motion picture industry and to keep their film library from the television field from 1941 until 1956, when it was sold for a fabulous sum by Paramount. Suddenly, these dormant so-called second rate cartoons "directed by Dave Fleischer" and produced by "Fleischer Studios" became the giants of the television industry and have made countless hundreds of millions of dollars for those who acquired them from Paramount.

The doctrine of the continuing antitrust conspiracy, set forth in *Winkler Koch Engineering Co. v. Universal Products Co.*, 100 F. Supp. 15, is clearly applicable to the facts in the within action and not the doctrine of *Rutkin v. Reinfeld*, 229 F. 2d 248, which was not an antitrust case but merely interpreted the New York law with respect to the time for the commencement of an action for fraud and deceit as being required to be started with six years of the discovery of the fraud. In *Rutkin*, the basis of jurisdiction was diversity of citizenship and the U. S. Court of Appeals held that the cause of action accrued at the time when the injury occurred, not at the time of discovery of the fraud.

The within antitrust action does not come within the compass of *Rutkin* but should be brought within the scope of *Winkler Koch, supra.* The proper limitation statute applicable to the facts in the within action is the Florida twenty-year period of limitation "in actions upon a contract, obligation, or liability founded upon an instrument of writing under seal" to be found in Section 95.11 of the Florida Statute of Limitations, quoted at page 11 of the petition. That did not run out until 1961, four years after this action was commenced.

In Point I(d) the Paramount defendants assert that the complaint does not allege any antitrust violations (p. 17, Respondents' Brief).

The block booking of which the petitioner complains is part and parcel of the vertical and horizontal conspiracy which has been found to be illegal by this Court and the District Court in *U. S. A. v. Paramount.* The coercion practiced upon the Fleischers is so clearly spelled out as to make absurd the contention of the Paramount defendants, that "Such right, in the absence of coercion or conditioning has never been questioned."

In Point I(e) the Paramount defendants assert that "Even if Paramount had engaged in violations of the antitrust laws, it did not therefore forfeit any of its private contractual rights against Fleischer Studios, nor did Fleischer Studios sustain any damage."

The first portion of the point relates to the indivisibility of the contract of May 24, 1941, which incorporates both a sale of the Fleischer library of films and all of its assets with the continuing portion of the contract which requires the Fleischers to complete the "New Cartoons" with the same antitrust provisions for distribution con-

tained in the one contract as were contained in the earlier 1938 contract. This point has been fully covered in the petition herein.

The second portion of the point raises the contention that because *U. S. A. v. Paramount* was primarily directed to distributors and exhibitors, that one who delivered his product to Paramount for distribution and exhibition might not be otherwise injured by the antitrust activities of Paramount and its co-defendants. Such injury is and damage is directly spelled out in the complaint by the allegations, *inter alia*, that the remarkable Fleischer cartoon product was block-booked with tenth rate Paramount and other film outputs, and that the Fleischers were given an inordinately low proportion of the joint income. Hence, the Fleischers were in continual debt to Paramount, their product was withdrawn from the market and only released for television purposes in 1956, after their cartoons had been sold outright for a fabulous sum of money by Paramount. The damages suffered by the Fleischers can be easily proven on a trial.

Collateral estoppel and *res adjudicata* considered.

The respondents all contend that the unappealed decision of Judge Harold Baer rendered in the Supreme Court New York County, in 1961, which relied primarily upon the decision of District Judge Palmieri, dismissing the antitrust action, which was rendered in 1959, are *res adjudicata* and constitute a collateral estoppel against the consideration by this Court of Judge Palmieri's decision and of the decision of Chief Judge Ryan in dismissing the accounting action. The Paramount defendants fought for six years to prevent Judge Palmieri's decision from becoming final so that it might be appealed. In the meantime they and those who acquired rights from them have

used Judge Palmieri's decision to obtain dismissal of the actions brought against them.

Rather than an estoppel by judgment this is a case where review has been skillfully prevented by Paramount defendants and they should be refused the right to assert the defense of *res adjudicata*. The original decision of Judge Palmieri should be reviewed by this Court as if it had been reviewed in 1959 before the New York State Court decision had been rendered. If as petitioner contends the decision of Judge Palmieri is erroneous, then the petition for certiorari should be granted. Since the point has been fully covered in our petition we rest thereon.

Respectfully submitted,

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